STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 11, 2001
V	No. 229695 Kent Circuit Court
STANLEY D. KELLOGG, Defendant-Appellant.	LC No. 98-011628-FH

Before: Collins, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Defendant pleaded guilty to third-degree fleeing and eluding a police officer, MCL 257.602a(3), and operating a motor vehicle under the influence of intoxicating liquor, second offense, MCL 257.625 (OUIL-2nd). Defendant was sentenced to serve concurrent terms of 2½ to 5 years' and six months' imprisonment on the respective convictions. This Court denied defendant's application for delayed leave to appeal; however, our Supreme Court, in lieu of granting leave to appeal, remanded the case to us for consideration as on leave granted.[1] We affirm.

Defendant's claim on appeal is based on statements that the trial court made at the plea hearing. At that time, the prosecution indicated that it had made a plea agreement with defendant. The agreement was that in exchange for his plea of guilty and sentencing to the charges of fleeing and eluding and OUIL-2nd, reduced from OUIL-3rd, and defendant's truthful testimony at a trial in an unrelated case, a charge of driving with a suspended license and a supplemental information charging defendant as a fourth-offense habitual offender would be dismissed. In addition, the prosecutor made a sentence recommendation that defendant receive no more than one year in jail. Defendant acknowledged that to be the full and complete agreement in the case. The trial court then proceeded to complete the guilty plea. At the conclusion of the plea hearing, the trial court made the following statement:

> Mr. Kellogg, I want you to know that I haven't made any agreements or deals with anyone about a plea or sentence. I will go along with the

[1] *People v Kellogg*, 463 Mich 865 (2000).

> recommendation about [the] sentence in this case, provided you keep your end of the bargain, which is providing truthful testimony next week, or whenever that case goes to trial. But, beyond that, I haven't made any agreements or deals.

Subsequent to the plea, defendant testified in the unrelated trial as the plea agreement required,[2] and then appeared before the trial court for sentencing. At the sentencing hearing, the trial court indicated that it could not "accept" the prosecutor's sentence recommendation and offered defendant the opportunity to withdraw his plea of guilty. Defendant's counsel argued that the trial court should abide by the recommendation because the prosecution had already received the benefit of defendant's testimony and because the trial court had promised to go along with the recommendation if defendant "keeps his end of the bargain." The trial court responded that it was in full compliance with the law and required that defendant choose between going forward with sentencing or withdrawing his guilty plea. Defendant opted to proceed with sentencing and this appeal ensued.

On appeal, defendant argues that he is entitled to specific performance of the sentence recommendation that the prosecutor made. Defendant maintains that the trial court's representation that if he complied with the term of the plea agreement to provide truthful testimony, then the trial court would go along with the prosecutor's recommendation, induced him into compliance and now requires this Court to order the trial court to sentence defendant in conformity with the prosecutor's recommendation.

Although we are troubled by the apparent promise that the trial court made that was not honored at sentencing, we reject defendant's claim for specific performance because the record does not support a finding that the promise was part of the plea bargain in the case. The plea bargain as stated on the record was negotiated between the prosecutor and defendant. Nothing about the bargain suggests that the trial court participated in or affirmed the agreement prior to the moment that the trial court made its promise at the conclusion of the case. To the contrary, the trial court stated that it had not made any "agreements or deals." As such, the promise of the trial court was gratuitous, not bargained for and not part of the consideration that induced defendant to make his plea. Consequently, defendant cannot credibly argue that the trial court's promise induced his guilty plea or his subsequent performance of a term of the plea agreement that required him to offer truthful testimony in an unrelated case. Further, as the trial court noted, defendant received considerable benefits from the plea bargain, including a reduced charge on the OUIL count and dismissal of a charge of driving with a suspended license and of a supplemental information charging defendant as a fourth-offense habitual offender.

With regard to the prosecution of the case, the record demonstrates that defendant received that for which he bargained. The prosecutor made the sentence recommendation to the trial court and never wavered from it. Just because the trial court determined not to follow the recommendation does not entitle defendant to specific performance. The only specific performance to which defendant was entitled was from the prosecutor for a recommendation of a

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[2] That testimony is not part of the record, but the prosecution does not challenge that representation, nor was that fact disputed at the sentencing hearing.

one-year jail sentence. *People v Siebert*, 450 Mich 500, 516-518; 537 NW2d 891 (1995). That promise was honored. When the trial court decided not to follow the recommendation, defendant's options were to proceed with sentencing or withdraw his plea. *People v Killebrew*, 416 Mich 189, 209-210; 330 NW2d 834 (1982).[3] Defendant was afforded the opportunity to make that choice. Having opted to go forward with the sentencing, he is entitled to no further relief.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

[3] Modification recognized by *People v Williams*, 464 Mich 174; 626 NW2d 899 (2001).